

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2466
STATE OF WISCONSIN**

Cir. Ct. No. 2011CV123

**IN COURT OF APPEALS
DISTRICT II**

GE HEALTHCARE,

PLAINTIFF-APPELLANT,

V.

LMJ IMAGING SERVICES OPEN MRI, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed in part and reversed in part.*

Before Brown, C.J., Gundrum and Hoover, JJ.

¶1 PER CURIAM. GE Healthcare appeals from a circuit court order vacating a default judgment against LMJ Imaging Services Open MRI, Inc. (LMJ Imaging) and dismissing its action against LMJ Imaging in order to permit arbitration between the parties. GE Healthcare contends that its action against

LMJ Imaging was a collection matter and not subject to arbitration under the parties' contract. It further contends that LMJ Imaging was not entitled to relief from the default judgment. Finally, GE Healthcare submits that even if the parties' dispute was subject to arbitration, the court should not have dismissed the matter.

¶2 We conclude that the circuit court correctly determined that the parties' dispute was something other than a collection matter and therefore subject to arbitration under the parties' contract. We further conclude that the court properly vacated the default judgment against LMJ Imaging. However, we agree with GE Healthcare that the court erred in dismissing its action against LMJ Imaging, as the matter should have been stayed pending arbitration pursuant to WIS. STAT. § 788.02 (2011-12).¹ Therefore, we affirm in part and reverse in part.

¶3 In 2006, GE Healthcare sold an MRI machine to LMJ Imaging. When the machine was delivered, the president of LMJ Imaging discovered that the imaging coils, necessary to attain the quality of images desired, were missing. Over time, the MRI machine developed other problems as well. LMJ Imaging informed GE Healthcare of these issues and did not pay for the MRI machine as required by the parties' contract.

¶4 On November 21, 2011, GE Healthcare sued LMJ Imaging for breach of contract, seeking money damages and replevin. When LMJ Imaging did not timely answer the complaint, the circuit court entered a default judgment against LMJ Imaging.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

¶5 Approximately one month later, LMJ Imaging filed a motion seeking relief from the default judgment pursuant to WIS. STAT. § 806.07. It also submitted a proposed answer asserting several affirmative defenses, including GE Healthcare's prior breach of contract, the failure of the MRI machine to meet the standard of merchantability, and the parties' agreement to submit disputes to arbitration.

¶6 After two hearings on the matter, the circuit court found that extraordinary circumstances warranted relief from the default judgment under WIS. STAT. § 806.07(1)(h). The extraordinary circumstances were an arbitration clause within the parties' contract that required the parties to submit all disputes, "other than collection matters," to arbitration. The court found that GE Healthcare was on notice from LMJ Imaging regarding the alleged defects in the operation and performance of the MRI machine and its alleged breaches of the contract prior to filing suit. Thus, the court concluded that the parties' dispute should have been submitted to arbitration and that GE Healthcare inappropriately filed its case in the court.

¶7 Accordingly, on October 11, 2011, the circuit court entered a written order vacating the default judgment against LMJ Imaging and dismissing GE Healthcare's action in order to permit arbitration between the parties. This appeal follows.

¶8 On appeal, GE Healthcare first contends that its action against LMJ Imaging was a collection matter and not subject to arbitration under the parties' contract. It submits that the circuit court erred in considering information beyond the four corners of the complaint in determining that the parties' dispute was

something other than a collection matter. It further submits that LMJ Imaging waived any right it had to arbitration.

¶9 As noted, GE Healthcare and LMJ Imaging entered into a contract which provided: “Disputes (other than collection matters) arising under or relating to this agreement will be submitted to the American Arbitration Association....” The phrase “collection matters” is not defined in the contract. However, we understand it to simply refer to a legal matter where one party defaults on a payment and has no defense other than “I can’t pay it,” “I don’t want to pay it,” or “I can pay it, but on different terms and more time to pay.” Whether the facts of this case meet this definition is a question of law that we review de novo. *See State v. Trochinski*, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891 (the application of facts to a legal standard is a question of law that we review independently).

¶10 Here, the circuit court reviewed LMJ Imaging’s proposed answer and various collection log notes, which demonstrated that LMJ Imaging had not paid GE Healthcare due to issues with the MRI machine. From this, the court determined that LMJ Imaging had defenses or unpled counterclaims that were subject to arbitration.

¶11 Although GE Healthcare maintains that the circuit court erred in considering information beyond the four corners of the complaint, we are not persuaded. After all, just because one party characterizes a dispute as a collection matter does not make it so. Accordingly, we conclude that it was not error for the court to look beyond the four corners of the complaint to determine the true nature of the parties’ dispute. Upon review of the pleadings, we are satisfied that the

court correctly determined that the dispute was something other than a collection matter and therefore subject to arbitration under the parties' contract.

¶12 Finally, we are not persuaded that LMJ Imaging waived any right it had to arbitration. While LMJ Imaging could have initiated arbitration proceedings earlier against GE Healthcare for its issues with the MRI machine, the fact that it did not do so is not dispositive to our analysis. Likewise, the fact that LMJ Imaging defaulted by failing to timely respond to GE Healthcare's complaint is not dispositive because the circuit court vacated the default judgment.

¶13 GE Healthcare next contends that LMJ Imaging was not entitled to relief from the default judgment. It submits that LMJ Imaging did not establish the existence of extraordinary circumstances under WIS. STAT. § 806.07(1)(h).² It also submits that the circuit court erred by failing to explicitly consider the five interest of justice factors outlined in *Miller v. Hanover Ins. Co.*, 2010 WI 75, 326 Wis. 2d 640, 785 N.W.2d 493.

¶14 A circuit court appropriately grants relief from a default judgment under WIS. STAT. § 806.07(1)(h) when extraordinary circumstances are present justifying relief in the interest of justice. *Miller*, 326 Wis. 2d 640, ¶35. Extraordinary circumstances are those where "the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of *all* the facts." *Id.* (citations omitted).

² GE Healthcare also maintains that LMJ Imaging did not establish "excusable neglect" under WIS. STAT. § 806.07(1)(a). Because the circuit court did not find "excusable neglect" in this case, and because LMJ Imaging does not argue on appeal that its failure to timely respond to GE Healthcare's complaint was the result of "excusable neglect," we do not address this issue further.

¶15 Whether to grant relief from judgment under WIS. STAT. § 806.07(1)(h) is a discretionary decision. *Miller*, 326 Wis.2d 640, ¶29. In exercising its discretion under this statute, the circuit court should consider a wide range of factors, keeping in mind the competing interests of finality and fairness. *Id.*, ¶36. While other factors may be relevant, the court must consider five “interest of justice” factors, which are

[1] whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; [2] whether the claimant received the effective assistance of counsel; [3] whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; [4] whether there is a meritorious defense to the claim; and [5] whether there are intervening circumstances making it inequitable to grant relief.

Id. (citation omitted).

¶16 As noted, the circuit court found that extraordinary circumstances existed to grant relief to LMJ Imaging from the default judgment. The extraordinary circumstances were the arbitration clause within the parties’ contract that required the parties to submit all disputes, “other than collection matters,” to arbitration. The applicability of this clause and the fact that GE Healthcare was aware of the issues concerning the MRI Machine prior to filing its lawsuit were factors in the circuit court’s decision.

¶17 Reviewing the circuit court’s decision, we acknowledge that it did not exhaustively consider the five interest of justice factors outlined in *Miller*. Nonetheless, because the court’s decision is discretionary, we look for reasons to sustain it and will independently review the record to determine whether it

properly exercised its discretion and whether the facts provide support for its decision. *Id.*, ¶30.

¶18 Our independent review of the record persuades us that there is a basis for the circuit court to exercise its discretion to conclude that extraordinary circumstances existed to grant relief to LMJ Imaging from the default judgment. We also conclude that each of the five interest of justice factors outlined in *Miller* is satisfied: (1) the default judgment entered against LMJ Imaging was not the result of a conscientious, deliberate, and well-informed choice; (2) LMJ Imaging did not receive effective assistance of counsel, as evidenced by its counsel's failure to timely respond to GE Healthcare's complaint; (3) there has been no judicial consideration of the specific merits of GE Healthcare's claim and the public interest in having judicial consideration of the merits outweighs the policy supporting the finality of judgments;³ (4) LMJ Imaging has a meritorious defense to GE Healthcare's claim stemming from its issues with the MRI machine; and (5) it was not inequitable to GE Healthcare to set aside the default judgment because it should never have been in the position to receive it. On this last point, we agree with the circuit court that the parties' dispute should have been submitted to arbitration and that GE Healthcare inappropriately filed its case in the court.

¶19 Finally, GE Healthcare submits that, even if the parties' dispute was subject to arbitration, the circuit court should not have dismissed the matter. On this last issue, we agree with GE Healthcare. Under WIS. STAT. § 788.02, the dismissal of GE Healthcare's complaint was inappropriate because that statute

³ In examining this factor, we are mindful of the fact that appellate courts regard default judgments with particular disfavor. *See, e.g., Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶31, 326 Wis. 2d 640, 785 N.W.2d 493.

calls for the circuit court to stay an action pending arbitration rather than dismiss it. Accordingly, we reverse the portion of the order dismissing GE Healthcare's action against LMJ Imaging.

By the Court.—Order affirmed in part and reversed in part.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

